IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

O R D E R

Ugam Raj v. Civil Judge(SD), Sojat City & Ors.

S.B.CIVIL WRIT PETITION NO.1877/2005
under Articles 226 and 227 of the Constitution of India.

Date of Order : 11th July, 2005

P R E S E N T

HON'BLE MR.JUSTICE GOVIND MATHUR

Mr. K.C.Samdariya, for the petitioner.
Mr. Vikas Balia, for the respondents No.2 and 3.

BY THE COURT :

By this petition for writ a challenge is given to the order dated 19.2.2005 passed by learned Civil Judge (Senior Division), Sojat City in Civil Original Suit No.62/90 (51/2001), Gautam Raj & Anr. v. Ugam Raj. By the order impugned dated 19.2.2005 the court below decided issues No.1, 11-A, 11-B and 11-C framed while adjudicating the suit for eviction from premises filed by the respondent plaintiffs.

The plaintiffs respondent No.2 and 3 preferred a suit in the year 1990 before the competent civil court seeking decree against the petitioner defendant for eviction from premises rented and for

recovery of rent. After filing of written statement by the petitioner defendant the court adjudicating the suit framed 12 issues. Three additional issues numbered as 11-A, 11-B and 11-C were framed by the court below as a consequence of acceptance of an application preferred by the petitioner defendant under Rule 17 Order 6 CPC for making amendment in the written statement. The additional issues so framed read as under:-

> " {11-ए} आया कानूनन नोटिस के अभाव में दावा खारिज किये जाने योग्य है ?
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> - प्रतिवादी -
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> {11-बी} आया वादी द्वारा दौराने वाद न्यायालय द्वारा निर्धारित किराया प्राप्त कर लेने से धारा 113 टी. प. एक्ट के तहत नोटिस का वेवर हो गया है ?
>
> - प्रतिवादी -
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> {11-सी} आया किरायेदारी अधिनियम के अन्तर्गत पेश किया गया यह दावा संशोधित प्रावधानों के अनुसार चलने योग्य नहीं है ?
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> - प्रतिवादी -"

The court by order impugned decided all the three additional issues and issue No.1. By this petition for writ challenge is given to the findings given by the court below with regard to issues No.11-A, 11-B and 11-C, however, while arguing the case the counsel for the petitioner pressed into service challenge to finding pertaining to issue No.11-C only.

The court below while deciding issue No.11-C in favour of plaintiff and against defendant held that provisions of sub-sec.(3) of Section 32 of the Rajasthan Rent Control Act, 2001 (hereinafter referred to as "the Act of 2001") does not apply in the case in hand. Further, the provisions of Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (hereinafter referred to as "the Act of 1950") stood repealed and, therefore, is having no application in the city of Sojat. The court below accordingly ordered that eviction of premises proceedings in the city of Sojat can be taken only in accordance with the provisions of Transfer of Property Act.

The contention of counsel for the petitioner to challenge the finding given for issue in question is that the court below misread the provisions of sub-sec.(3) of Section 32 of the Act of 2001 and, therefore, committed an error patent while holding that the suit in hand is required to be decided in accordance with the provisions of Transfer of Property Act only. It is contended by the counsel for the petitioner that according to clause (a) of sub-sec.(3) of Section 32 of the Act of 2001 all suits under the repealed Act i.e. the Act of 1950 pending on the date of commencement of the Act of 2001 shall be continued and disposed of in accordance with the provisions of the Act of 1950 if not withdrawn within a period of 180 days of coming into force of the Act of 2001 with

liberty to file fresh proceedings under the Act of 2001, as such finding given by the court below, according to the counsel for the petitioner, is patently erroneous and, therefore, deserves to be quashed.

No reply to the writ petition is filed by the respondents plaintiff. However, a preliminary objection is raised to the effect that the petitioner defendant cannot be permitted to maintain the writ petition on the principle that a person cannot both approbate and reprobate. It is contended by Shri Vikas Balia, counsel appearing on behalf of the respondents No.2 and 3 that issues No.11-A, 11-B and 11-C were framed as a consequence of an application preferred by the defendant to amend written statement and it was the case of the petitioner defendant that the Act of 1950 would not apply ad the suit is required to be decided by application of the provisions of Transfer of Property Act.

The petitioner by present writ petition is challenging the order which he himself sought by way of filing an application. To substantiate the contention Shri Vikas Balia placed reliance upon a judgment of Hon'ble Supreme Court in the case of Nagubai Ammal & Ors. v. B.Shama Rao and others, reported in AIR 1956 SC 593, wherein their Lordships held as under:-

"(23)But it is argued by Sri Krishnaswami Ayyangar that as the proceedings in O.S.No.92 of 1938-39 are relied on as barring the plea that the decree and sale in O.S.No.100 of 1919-20 are not collusive, not on the ground of res judicata or estoppel but on the principle that a person cannot both approbate and reprobate. It is immaterial that the present appellants were not parties thereto, and the decision in Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd. (1921) 2 KB 608 (D), and in particular, the observations of Scrutton, L.J. At p.611 were quoted in support of this position. There, the facts were that an agent delivered goods to the customer contrary to the instructions of the principal, who thereafter filed a suit against the purchaser for price of goods and obtained a decree.

Not having obtained satisfaction, the principal next filed a suit against the agent for damages on the ground of negligence and breach of duty. It was held that such an action was barred. The ground of the decision is that when on the same facts, a person has the right to claim one of two beliefs and with full knowledge he elects to claim one and obtains it, it is not open to him thereafter to go back on his election and claim the alternative relief. The principle was thus stated by Bankes, L.J.:

"Having elected to treat the delivery to him as an authorised delivery they cannot

treat the same act as a misdelivery. To do so would be to approbate and reprobate the same act".

The observations of Scrutton, L.J. on which the appellants rely are as follows:

> "A plaintiff is not permitted to 'approbate and reprobate'. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election—namely, that no party can accept and reject the same instrument: Ker v. Wauchope (1819) 1 Bligh 1 (21) (E): Douglas-Menzies v. Umphelby 1908 AC 224 (232) (F). The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction."

I have heard counsel for the parties.

The Act of 2001 came into force by receiving assent of the President on the 25th day of February, 2003 and on its publication in Rajasthan Government Gazette, Extraordinary Part-IV-A dated 11.3.2003 by force of Section 32 of the Act of 2001. The Act of 1950 (Act No.17 of 1950) stood repealed with effect from the date notified under sub-sec.(3) of Section 1 of the Act

of 2001 i.e. 11.3.2003. While repealing the Act of 1950 by force of Section 32 of the Act of 2001 certain proceedings taken under the Act of 1950 were saved. Section 32 of the Act of 2001 reads as under:-

> "Section 32.Repeal and savings.--(1)The Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (Act No.17 of 1950) shall stand repealed with effect from the date notified under sub-sec.(3) of Section 1 of this Act.
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> (2)The repeal under sub-sec.(1) shall affect,--
> (a)anything duly done or suffered under the enactment so repealed; or
> (b)any right, title, privilege, obligation or liability acquired or incurred under the enactment so repealed; or
> (c)any fine, penalty or punishment incurred or suffered under the provisions of the enactment so repealed.
>
> (3)Notwithstanding the repeal under sub-sec. (1).--
> (a)all applications, suits or other proceedings under the repealed Act pending on the date of comm
> .encement of this Act before any Court shall be continued and disposed of, in accordance with the provisions of the repealed Act, as if the repealed Act had continued in force and this Act had not been enacted. However, the plaintiff within a period of one hundred and eighty days of coming into force of this

> Act shall be entitled to withdraw any suit or appeal or any other proceeding pending under the repealed Act with liberty to file fresh petition in respect of the subject matter of such suit or appeal or any other proceeding under and in accordance with the provisions of this Act and for the purposes of limitation such petition shall, if it is filed within a period of two hundred and seventy days from the commencement of this Act, be deemed to have been filed on the date of filing of the suit which was so withdrawn and in case of withdrawal of appeal or other proceeding, on the date on which the suit, out of which such appeal or proceeding originated, was filed;
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> (b)the provision for appeal under the repealed Act shall continue in force in respect of applications, suits and proceedings disposed of thereunder;
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> (c)all prosecutions instituted under the provisions of the repealed Act shall be effective and disposed of in accordance with such repealed law;
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> (d)any rule or notification made or issued under the repealed Act and in force on the date of commencement of this Act shall continue to govern the pending cases."

From reading of clause(a) of sub-sec.(3) of Section 32 of the Act of 2001 it is crystal clear that notwithstanding the repeal under sub-sec.(1) all applications, suits or other proceedings under the repealed Act pending on the date of commencement of the Act of 2001 before any court remain continued and are

required to be disposed of in accordance with the provisions of repealed Act as if the repealed Act had continued in force and the Act of 2001 had not been enacted. Under sub-sec.(3) of Section 32 of the Act of 2001 a liberty is given to the plaintiff with a right to withdraw any suit or appeal or any other proceedings pending under the Act of 1950 with liberty to file fresh petition in respect of subject matter of such suit or appeal or any other proceedings.

In the present case the suit was filed in the year 1990 seeking a decree for eviction and recovery of rent in accordance with the Act of 1950. The plaintiff did not choose to withdraw the suit within a period of 180 days, as such the plaintiff was interested to be continued with suit and to get it disposed of in accordance with the provisions of the Act of 1950. The court below patently misread the provisions of sub-sec. (3) of Section 32 of the Act of 2001 while reaching at the conclusion that the act of 1950 stood repealed, the Act of 2001 is not having application in Sojat City, therefore, the suit is required to be disposed of in accordance with the provisions of Transfer of Property Act only.

In view of whatever discussed above the finding given by the court below with regard to issue No.11-C is declared erroneous and the same deserves to be quashed.

The contention of the counsel for the respondents defendant to the effect that the writ cannot be maintained on basis of principles of approbate and reprobate is of no consequence as the principle referred above is not having any application contrary to statute. In the present case by the force of sub-sec.(3) of Section 32 of the Act of 2001 the proceedings under the Act of 1950 are saved and as such the preliminary objection so raised is meritless.

The counsel for the respondents further stated that issues No.11-A, 11-B and 11-C were framed at the instance of the petitioner and the stand of the petitioner was that the suit in hand could be decided only in accordance with the provisions of Transfer of Property Act and now the defendant want to change its stand, the sole intention of the petitioner seems just to linger on the matter as much as possible.

I consider this aspect of the matter and found force in the same. The petitioner himself moved an application under Order 6 Rule 17 CPC for amendment of the written statement and the same was accepted. As a consequence of amendments introduced in the written statement additional issues No.11-A, 11-B and 11-C were framed. The stand of the petitioner defendant was that the suit is required to be adjudicated in accordance with the provisions of Transfer of Property Act. The

plaintiff has challenged the finding given on the same issue by way of filing this writ petition. This clearly shows that the petitioner by one or other means want to linger on the proceedings. The conduct of the petitioner, therefore, is highly deplorable. The petitioner, therefore, deserves to be settled with exemplary cost.

In view of whatever stated above the writ petition is allowed in part. The finding given by the trial court in civil suit NO.62/90 (51/2001) by the order impugned dated 19.2.2005 with regard to issue No.11-C is quashed and it is held that the suit in hand is required to be decided in accordance with the provisions of the Act of 1950. A cost of Rs.8000/- is imposed upon the petitioner out of which a sum of Rs.5000/- is required to be paid to the respondents No.2 and 3 and the remaining amount of Rs.3000/- is required to be deposited with the District Legal Services Authority, District Pali. The cost is required to be paid within a period of one month from today.

(GOVIND MATHUR),J.

kkm/ps.